



CIRSA LOSS ALERT

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Recent Tenth Circuit Decision May Affect Your Door-to-Door Solicitation Ordinance

If your city or town has an ordinance regulating door-to-door solicitation, you're not alone. Many cities and towns have adopted ordinances regulating the activities of door-to-door solicitors in an effort to address safety and privacy concerns. But, if your ordinance includes a curfew—and particularly, a pre-dusk curfew—that provision can run afoul of the U.S. Constitution according to a recent decision by the Tenth Circuit Court of Appeals.

The Tenth Circuit's [decision](#), issued on May 15, stems from a dispute between Aptive Environmental Services, LLC ("Aptive") and the Town of Castle Rock over the Town's 7:00 p.m. curfew on commercial door-to-door solicitation (the "Curfew"). In the case, Aptive claimed it ordinarily encourages its solicitors to work through dusk so as to contact people that are not home earlier in the day. The Town's Curfew prohibited commercial solicitors from entering private property after 7:00 p.m. and before 9:00 a.m. In the lawsuit, Aptive alleged the Curfew unconstitutionally burdened its First Amendment right to engage in door-to-door solicitation. The Town argued, among other defenses, that the Curfew was justified in view of its residents' substantial interests in privacy and safety from crime.

In its decision, the Tenth Circuit held that in-person commercial solicitation is protected by the First Amendment. The Court also held the Town carried the burden of showing the Curfew advanced substantial state interests "in a direct and material way." While the Court noted the Town's interests in public safety and protecting residents' privacy are substantial in the abstract, it held the Town had failed to show with specific evidence how the Curfew would in fact alleviate privacy and safety concerns to a material degree. In so holding, the Court concluded the information cited by the Town was insufficient to justify the Curfew but did not provide clear guidance on exactly what types and amount of evidence would be sufficient. The decision can be appealed to the U.S. Supreme Court, which in its discretion can grant or deny a petition for certiorari review.

What does this new Tenth Circuit decision mean for your solicitation ordinance? First, if your ordinance includes a curfew—and particularly one that bars soliciting before dusk—we'd recommend you not enforce that provision for the time being and carefully review the Tenth Circuit's decision and your entity's own circumstances. Unless you have a significant body of evidence pointing to real harm arising after your specific curfew hour, we'd suggest eliminating the curfew and further evaluating options for amendments to your ordinance. Second, with this recent decision, the Tenth Circuit has set a high bar for justifying any curfew, and in doing so has heightened the risks of civil rights liability for your entity and law enforcement officers.

While the Tenth Circuit's decision in the *Aptive Environmental* case leaves open questions about what exactly is required to justify a curfew for solicitors, it's clear the federal courts will closely scrutinize your ordinance, your reasons for a curfew, and the evidence you have to back it up. Thus, from this standout, a curfew can be a risky tool and a potential target for challenge, so you'll want to consult closely with your municipal attorney on this topic.

If you have any questions regarding this article, please call our Liability Hotline at 800.228.7136 to speak to CIRSA's General Counsel, Sam Light.